IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1131

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST C. GRAYSON, Superintendent - Petitioners

versus

JOHN E. HAYCRAFT, Et Al. - - Respondents
(Addition Respondents Inside Cover)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

*Findings of Fact and Conclusions of Law, Separate Appendix, p. 14.

TABLE OF AUTHORITIES

Federal Cases: (Cont'd)

Constitutional Provisions:

United States Statute:

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Board of Education of Jefferson County, Kentucky, and its Superintendent, Ernest C. Grayson, respectfully pray that a writ of certiorari issue to review the decision rendered in this case on October 20, 1978 by the United States Court of Appeals for the Sixth Circuit, and the decision rendered by the Court of Appeals on August 23, 1976.

OPINIONS AND ORDERS BELOW

The Court of Appeals on December 28, 1973, reversed the District Court's dismissal of these consolidated desegregation actions. This Court vacated the

decision of the Sixth Circuit. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 489 F. 2d 925 (6th Cir. 1973), *vacated and remanded* at 418 U. S. 918 (1974) for reconsideration in light of *Milliken* v. *Bradley*, 418 U. S. 717 (1974) *(Milliken I)*.

Six weeks after the entry of an order of mandamus by the Court of Appeals, *Newburg Area Council* v. *Gordon*, 521 F. 2d 578 (6th Cir. 1975), the District Court entered a plan of desegregation on July 30, 1975. That unreported opinion is contained in the separate Appendix to this Petition at pp. 31-71.

The District Court, by its Order of April 19, 1977, exempted certain first grade children from that aspect of the overall plan of desegregation which requires reassignment and cross-district transportation during certain years in school. The Order and Findings of Fact of the District Court are not reported. They are contained in the separate Appendix to this Petition at pp. 9, 10-16.

The Opinion of the United States Court of Appeals for the Sixth Circuit to which this Petition is directed with respect to the first grade issue was decided and filed on Oetber 20, 1978 and is reported as *Haycraft* v. *Board af Education of Jefferson County, Ky.*, 585 F. 2d 803 (6th Cir. 1978). The decision to which this petition is directed commanding systemwide transportation is reported as *Cunningham* v. *Grayson*, 541 F. 2d 538 (6th Cir. 1976).

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 20, 1978. This Petition for Writ of Certiorari directed to such Judgment was filed within nintey days thereof. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT OF QUESTIONS PRESENTED

A. Where a Comprehensive Plan of Desegregation Substantially Desegregates First Grade Classes, Can the Court of Appeals Require an Additional Remedy of Systemwide Busing to Increase the Degree of Racial Balance in Such Classes?

B. Can the Court of Appeals Impose a Systemwide Remedy for First Graders or Other School Children in a Neighborhood School System in the Absence of a Finding of Any Incremental Impact on Racial Distribution Where the District Court Specifically Found that the Neighborhood Schools Merely Reflected the Racial Composition of the Geographic Areas They Served?

C. When the Findings of the District Court That Additional Cross-District Transportation Would Adversely Affect the Educational Process Are Not Reversed as Clearly Erroneous, Can the Court of Appeals Nevertheless Require the Imposition of Such a Remedy?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision relevant to the issues in this case is Amendment XIV, Sec. 1, United States Constitution:

> ". . . nor shall any such state . . . deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

This consolidated desegregation case involves the metropolitan school system operated by the Board of Education of Jefferson County, Kentucky, one of the largest public school systems in the country. When this matter was first before the United States Court of Appeals for the Sixth Circuit in *Newburg Area Council* v. *Board of Education, supra,* the Court of Appeals reversed the determination by the District Court that the school systems then serving the present metropolitan area were unitary.

The Court of Appeals based its determination that the school systems were not unitary solely on the fact that numerous schools in both systems were "racially identifiable" in the context of pre-*Brown de jure* racial segregation. 489 F. 2d 925, 928. *Brown* v. *Board of Education of Topeka I,* 347 U. S. 483 (1954).

In its dismissal of the consolidated desegregation actions the District Court made a specific finding that the racial compositions of the neighborhood schools operated by the systems merely reflected that degree

of racial isolation found in the geographic areas which they served. The Court of Appeals did not reverse this finding in making its determination of the nature of the violation, as it simply held that the mere existence of racially identifiable schools in and of itself constituted a violation in school systems with a history of mandatory segregation by law, even though such segregation has long since ceased.

> A large number of racially identifiable schools in a school district that formerly practiced segregation by law gives rise to a presumption that all vestiges of state-imposed segregation have not been eliminated. *Newburg Area Council* v. *Board af Education, supra,* 489 F. 2d 925, 930.

As the Court of Appeals determined the existence of a constitutional violation solely on the basis of the existence of racially identifiable schools in a school system with a history of *de jure* segregation, the uncontroverted fact that the racially identifiable schools noted by the Court of Appeals simply reflected the racial composition of the geographic areas they served was determined to be of little consequence.

The Louisville, Kentucky metropolitan area is a racially mixed community with rather marked geographic racial isolation in the northwest quadrant of the metropolitan area. As the vast majority of black youngsters living within the geographic area served by only *one* of the two major school systems involved at that time, the Court of Appeals directed the District Court to disregard the district boundaries if those

boundaries impeded in any way the elimination of "racial identifiability". *Newburg Area Council* v. *Board of Education, supra,* 489 F. 2d 925, 932, *vac.* 418 U. S. 918 (1974).

The District Court formulated a desegregation plan which was designed to eliminate "racial identifiability" in every school in the system. All schools in the system were required to have a substantial white majority. The racial composition of the entire metropolitan area at that time was approximately 80 percent white and 20 percent black. As the Court of Appeals had determined that racial identifiability was to be eliminated, the District Court required that 80 percent of the 171 schools operated by the system reflect a racial composition from 15 to 25 percent black youngsters. The balance of the schools were required to have a racial composition of no less than 12½ percent and no more than 40 percent black children. See the separate Appendix to this Petition at pages 31-71.

The primary issue involved in *Haycraft* v. *Board of Education, supra,* was whether or not an *additional* remedy must be imposed with respect to first grade children. The original desegregation plan utilized the tools of redistricting, graded centers, school closings and clusters. Approximately one-third of all first graders under that plan attend schools which were exempted from the cross-district reassignment provisions of the plan because they were sufficiently "desegregated" by the use of the remedial tools in the plan which did not involve clustering of schools. First grade children in attendance at the *clustered* schools were to

be treated differently from all other youngsters at the clustered schools in the regular program.

Under the original plan first graders in clustered schools were to attend their neighborhood school for the first third of the school year and for the balance of the school year, they were to be transported to their reassigned school as a classroom unit in some manner not defined by the District Court.

When it became apparent, among other things, that the school system did not have the transportation facilities to implement the plan with respect to first graders, the District Court on December 15, 1975 waived the implementation of that portion of the order pertaining to first graders in clustered schools for the balance of the school year. The District Court, however, required the implementation of an extensive cross-cultural human relations program. The District Court later waived the implementation of the original first grade plan for the 1976-77 school year for children in clustered schools, ordering the continuation of the cross-cultural human relations program.

In addition, the District Court directed that first grade children who were retained in the first grade at the end of the school year would nevertheless be bused under the transportation reassignment provisions of the plan for children attending clustered schools if they would have been reassigned in the second grade. This latter provision resulted in substantial desegregation in first grades throughout the school system, even though children in the first grade for the first time who

attended clustered schools are not subject to cross-district reassignment.

In April, 1977 the District Court, on motion of the petitioners, exempted first grade children attending clustered schools from cross-district reassignment until such time as a systemwide kindergarten program was available. On May 10, 1977, the District Court found that the time of travel and distances which would actually be involved in the cross-district transportation of first grade pupils attending clustered schools would "significantly jeopardize the educational process for such children". Separate Appendix, page 14.

When the Court of Appeals considered the District Court's Findings of Fact of May 10, 1977, in *Haycraft* v. *Board of Education, supra,* it did not reverse as clearly erroneous any of the findings of fact directed to the educational impact on five and six year old children of daily bus rides in excess of one hour, one way. The Court of Appeals ignored the self-limiting nature of cross-district busing of very young children specifically identified in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 30-31 (1971) on the ground that the District Court's order would impede the total irradication of racial identifiability in first grade classes throughout the system. *Haycraft* v. *Board of Education, supra,* 585 F. 2d 803, 805. The Court of Appeals had previously determined in *Newburg Area Council* v. *Board of Education, supra,* that the vestiges of state-imposed segregation to be eliminated by the District Court were racially identifiable schools. 489 F. 2d 925, 931.

REASONS FOR GRANTING THE WRIT

The treatment of first grade children by the desegregation order, as amended, imposes a remedy which is more than sufficient in light of the violations involved. The Sixth Circuit's requirement that an *additional* remedy be imposed for first grade children demonstrates "an unduly grudging application" of the principles enunciated by this Court for the determination at the outset of a constitutional violation, as well as the principles for the proper determination of the scope of a judicial remedy in the event a violation is determined. *Columbus Board of Education* v. *Penick,* —— U. S. —— (1978), 99 S. Ct. 24, 25, No. 4-134, J. Rehnquist, Cir. J., *grant of stay.*[1]

The Sixth Circuit's analysis of the remedy for children in the first grade is clouded by its "questionable use of legal presumptions" relied upon when it determined the nature of the violation *and* the scope of the overall remedy in this case. *Columbus Board of Education* v. *Penick, supra,* 99 S. Ct. 24, 25.

When the additional remedy required for first grade children in clustered schools is viewed in the context of the overall plan of desegregation, it is clear that the Court of Appeals has treated racial balance as a substantive constitutional right in disregard of the decisions of this Court. *Swann, supra,* 402 U. S. 1, 24;

[1]See also *Washington* v. *Davis,* 426 U. S. 229, 239 (1976), *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252 (1977), *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406, 417; *Dayton, supra,* 433 U. S. 406, 420. *Swann, supra,* 402 U. S. 1, 16. *See also, Austin Independent School District* v. *United States,* 429 U. S. 990, 991 (1976) (Powell, J., concurring).

Spencer v. *Kugler,* 404 U. S. 1027 (1972), *Milliken I, supra,* 418 U. S. 717, 740-741.

Most significantly, the Court of Appeals' insistence on a pre-determined degree of racial balance completely overlooks the repeated warnings of this Court that the remedial tool of student transportation is by its very nature a limited tool. *Swann, supra,* 402 U. S. 1, 30-31.

The requirement of an additional remedy in the absence of a reversal as clearly erroneous of the finding that any such remedy would "significantly jeopardize the educational process for such children" (Findings of Fact, Separate Appendix, p. 14) disregards the decisions of this Court concerning the "proper allocation of functions between the district courts and the courts of appeals within the federal judicial system". *Dayton, supra,* 433 U. S. 406, 409.

Certiorari must issue in this case to the Sixth Circuit because that Court "has misinterpreted the mandate of this Court's *Dayton* opinion". *Columbus Board of Education* v. *Penick, supra,* 99 S. Ct. 24, 25. A contemporaneous grant of certiorari in this case would offer an additional opportunity for the Court to review the Circuit Court's undue reliance on presumptions in both the determination of a violation and the fashioning of a remedy.[2]

[2] *Penick* v. *Columbus Bd. of Ed.*, 583 F. 2d 787 (6th Cir. 1978), *stay granted, Columbus, supra,* 99 S. Ct. 24, *cert. granted,* ____ U. S. ____ (1979), 47 U.S.L.W. 3463 (1-8-79); *Dayton IV, Brinkman* v. *Gilligan,* 583 F. 2d 243 (6th Cir. 1978), *stay denied,* Stewart, Cir. J., No. A-212, ____ U. S. ____ (1978), 99 S. Ct. 27, *stay denied,* Rehnquist, J., No. A-212, ____ U. S. ____ (1978), 99 S. Ct. 28, *cert. granted,* ____ U. S. ____ (1979), 47 U.S.L.W. 3463 (1-8-79).

I. The Method Used by the Court of Appeals to Determine the Existence of a Violation Is in Conflict With *Washington* v. *Davis* and *Dayton.*

The essential question raised by the Court of Appeals' holding that first graders must be subject to cross-district reassignment and transportation involves the equation that the nature of the violation determines the scope of the remedy. *Swann, supra,* 402 U. S. 1, 16. The initial determination that a violation existed was not made in accordance with the decisions of this Court. As a result, the determination of the need for an additional first grade remedy is inherently suspect.

The evaluation of the requirement that an additional remedy *must* be imposed for first grade children "to eliminate 'all vestiges of state-imposed segregation'" has to start with an analysis of the method by which the Sixth Circuit determined the existence of a constitutional violation. *Newburg Area Council* v. *Board of Education, supra,* 489 F. 2d 925, 932.

In reversing the District Court, the Court of Appeals based its determination of a violation solely on the presumption that the *mere existence* of "racially identifiable" schools in a system which had previously practiced *de jure* segregation constituted a violation of the Equal Protection Clause. *Newburg Area Council* v. *Board of Education, supra,* 489 F. 2d 925, 930. The appellate court used the same analysis in this case to reach its holding of the existence of a constitutional violation in 1973 that was not only questioned by this

Court in *Dayton Board of Education* v. *Brinkman, supra,* but specifically reversed. 433 U. S. 406, 413-14.

The presumption of a violation based solely upon the mere existence of racially monolithic schools effectively eliminates the "State Action" requirement of the Fourteenth Amendment in our urban society characterized by segregated housing patterns. In *Austin, supra,* Justice Powell, concurring, specifically warned of the difficulties inherent in the fashioning of a systemwide plan of desegregation based upon a violation determined in this way. 429 U. S. 990, 991.

For this Court to adequately review the use of presumptions by the Court of Appeals in *Penick* v. *Columbus Bd. of Ed., supra,* and *Dayton IV, supra,* certiorari must issue to contemporaneously review the Sixth Circuit's decision in this case in *Cunningham* v. *Grayson.* It should be noted that Mr. Justice Powell has already suggested further consideration of *Cunningham* in light of *Dayton. Hollenbach* v. *Haycraft, cert. den.,* —— U. S. —— (1977), 98 S. Ct. 418.

> Mr. Justice POWELL would grant certiorari, vacate judgment and remand case to the Court of Appeals for further consideration in light of *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406, 97 S. Ct. 2766, 53 L. Ed. 2d 851 (1977). 98 S. Ct. 418.

II. Where No Finding of a Systemwide Incremental Effect on Racial Distribution Has Been Made, a Systemwide Remedy, Particularly for Very Young Children, Cannot Be Imposed Under This Court's Mandate in *Dayton.*

In *Dayton,* as here, the Court of Appeals failed to realistically address the question of the existence of impermissible state action. There, as here, the appellate court relied on a presumption to prove the violation. The presumption that one-race schools were constitutionally impermissible resulted in the imposition of sweeping systemwide plans of desegregation for both Dayton and Louisville, although the times of travel required in Dayton were minimal compared to those involved in this case.

In *Dayton,* this Court recognized that the inappropriate use of presumptions to determine a violation of necessity resulted in the imposition of a disproportionate systemwide remedy. Thus, this Court directed the Court of Appeals, on remand, to re-examine its rulings in *Brinkman* v *Gilligan, Dayton I,* 503 F. 2d 684 (6th Cir. 1974) and *Brinkman* v. *Gilligan, Dayton II,* 518 F. 2d 853 (6th Cir. 1975).

> The duty of both the District Court and the Court of Appeals is a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to *first* determine whether there was any action in the conduct of the business of the school board which was intended to, and *did in fact,* discriminate against minority pupils, teach-

ers, or staff. *Dayton, supra,* 433 U. S. 406, 420, *citing, Washington* v. *Davis, supra,* (Emphasis added).

For the additional guidance of the lower courts in fashioning the scope of a desegregation remedy, this Court directed the Court of Appeals in *Dayton,* not only to reevaluate its determination of the existence of a constitutional violation, but also to reexamine the scope of the remedy imposed.

> . . . The District Court in the first instance, subject to review by the Court of Appeals, *must* determine how much *incremental* segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. *Dayton, supra,* 433 U. S. 406, 420 (Emphasis added).

This specific inquiry is required to assist the courts in the fashioning of an overall remedy. "The remedy must be designed to redress that difference [in racial distribution] *and only if* there has been a systemwide impact may there be a systemwide remedy." *Dayton, supra,* 433 U. S. 406, 420 (Emphasis added) *citing Keyes* v. *School District, No. 1, Denver, Colorado,* 413 U. S. 189, 213 (1973).

The District Court fashioned a systemwide desegregation remedy resulting in strict racial balance in every school in the metropolitan Louisville area (approved in *Cunningham* v. *Grayson)* in the presence of the same

"nuances" imposed by the Court of Appeals in *Dayton I, Dayton II,* and *Dayton III, Brinkman* v. *Gilligan,* 539 F. 2d 1084 (6th Cir. 1976). 433 U. S. 406, 418. It is equally understandable that the District Court here has produced a district-wide plan of desegregation, the only hallmark of which is its imposition of strict racial balance in every school in the system. As suggested by Justice Powell previously, the Court of Appeals' requirement in this case that racial balance be imposed on a systemwide basis must be re-examined in light of the mandate of this Court in *Dayton* requiring specific proof of an incremental impact on racial imbalance in housing patterns as a strict prerequisite to the imposition of a systemwide remedy. *Hollenbach, supra,* 97 S. Ct. 418; *Dayton, supra,* 433 U. S. 406, 420. The power of this Court to review *Cunningham* v. *Grayson, supra,* in the context of the Court of Appeals' recent decision in *Haycraft* v. *Board of Education of Jefferson County, Ky.* is unquestioned.[3]

The confusion resulting from the Sixth Circuit's interpretation of the mandate of this Court in *Dayton* (resulting in the grant by this Court of certiorari in both *Dayton IV,* and *Penick* v. *Columbus Bd. of Ed.*), demands a contemporaneous grant of certiorari here. In reaching its recent decision in this matter in *Haycraft* v. *Bd. of Ed.,* the Sixth Circuit has *specifically* relied on *both* of the opinions in which certiorari was

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[3] *United States* v. *Carver,* 260 U. S. 482, 480 (1923); *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, 917 (1950); *Brown* v. *Allen,* 344 U. S. 443, 492 (1953); *Mercer* v. *Theriot,* 377 U. S. 152 (1964); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U. S. 481, 488, Fn. 6 (1968); *Hughes Tool Company* v. *Trans World Airlines, Inc.,* 409 U. S. 363, 364, Fn. 1 (1973).

recently granted by this Court. 585 F. 2d 803, 805. Accordingly, this Court should consolidate these matters for a hearing on the merits, or hold this matter in abeyance pending review of *Dayton IV*.

III. Busing First Grade Children From 30 to 75 Minutes When First Grades Are Presently Substantially Desegregated Raises Racial Balance to the Level of a Substantive Constitutional Right Contrary to *Swann*.

When the requirement of additional cross-district transportation of first grade children is reviewed in the context of the systemwide plan of desegregation presently under implementation in the Louisville metropolitan area, it is clear that the Court of Appeals has impermissibly raised a pre-conceived degree of racial balance to the level of a substantive constitutional right.

The systemwide plan of desegregation fashioned by the District Court was approved in *Cunningham* v. *Grayson*. That plan was based on a systemwide racial composition of 80 percent white youngsters and 20 percent black youngsters. The plan required *every* school in the system to have a substantial white majority, limiting the acceptable range of racial composition to 12½ to 40 percent black children.

Although that *range* was set, fully 80 percent of the schools in the system were required to have a racial composition within 15 percent to 25 percent, even though the undisputed evidence establishes that very severe geographical racial isolation is present in the Louisville metropolitan geographic area. Separate Appendix, pp. 31-71.

When the District Court remanded this matter from its active docket, the racial composition of the school system had risen from approximately 22 percent to nearly 30 percent black youngsters. Even though this significant demographic change had occurred, only a handful of the schools reflected pupil racial compositions which were not within the mandatory "guidelines" for racial composition. In remanding this matter from its active docket, the District Court indicated that it found no proof whatsoever that the racial composition of those schools lying outside its "guidelines" was affected in any way by a policy or action of the school system or its administration, citing in support of its remand *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976). No appeal was taken from the remand order.

The Addendum at the end of this Petition lists the present elementary school clusters in the school system. Each cluster shows the racial composition of the first grade and in addition, the racial composition of the balance of each school. An asterisk has been placed next to the racial composition of each clustered school which, *at the present time*, without the additional remedy required by the Court of Appeals is within the guidelines for racial composition mandated in the original desegregation order in its first grade classes. Over *half* of the clustered schools have first grades which *at the present time* are within 10 to 40 percent black in pupil racial composition.

Virtually all of the clustered schools are located in neighborhood school districts which are monolithic in

racial composition. The first school listed in each cluster serves a geographic area which, in each instance is in excess of 95 percent black youngsters in racial composition. All other schools in each cluster serve neighborhood geographic area which are in each instance from 90 to 100 percent white in racial composition.

The District Court's exemption from cross-district transportation only applies to those children in the first grade for the first time. Prior to the start of the second school year of busing the District Court, in conjunction with its limited exemption of first grades, required that all those first graders who were retained in the first grade each year *would* be required to participate in cross-district reassignment and transportation if they would have been bused in the second grade had they not been retained. The District Court also ordered that any first grade child wishing to make a voluntary majority-to-minority transfer in the first grade may do so at the school system's expense.

Consequently, instead of leaving first graders in the system "without redress" (*Haycraft, supra,* 585 F. 2d 803, 805), the limited exemption of first graders from cross-district busing by the district court in conjunction with those other orders of the District Court relating to first grade children has resulted in nearly half of all first grades in clustered schools falling *within* the strict racial guidelines of the court's overall desegregation plan.

Only seven out of the 70 schools in clusters have first grades with less than five percent of the minority

race. Six of those seven schools are former predominantly white schools to which access is guaranteed by the majority-to-minority transfer provision of the desegregation plan.

The primary concern of the Court of Appeals in *Haycraft* v. *Board of Education, supra,* apparently stems from its determination that the district court's exemption of first grade students in clustered schools from cross-district transportation would leave them without any redress for the violation of their constitutional rights.

> Although a federal district court has broad discretionary authority in exercising its equitable powers in formulating a remedy for violations of constitutional rights in a school desegregation case, certainly a district court would be abusing its authority by not ordering any remedy at all. Nor may a district court order a remedy of limited scope which leaves many who have suffered violations of their constitutional rights without redress. To exempt first grade students from busing would leave vestiges of segregation intact contrary to this Court's mandate. 585 F. 2d 803, 805.

The requirement by the Sixth Circuit that first graders without prior formal educational experience be bused a minimum of 30 minutes one way (up to one hour and fifteen minutes one way) where first grade classes are *already* substantially desegregated without such busing, conclusively demonstrates the Court of Appeals' elevation of racial balance, *per se,* to the level

of a substantive constitutional right in disregard of the decisions of this Court.

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approch would be disapproved and we would be obligated to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole. *Swann, supra,* 402 U. S. 1, 24.

Here the Court of Appeals has even gone one step further and required a particular degree of racial balance as a substantive constitutional right *in every grade* within a school system. *Contra, Spencer* v. *Kugler, supra, Milliken I, supra.* Certiorari should issue from this Court to review the decision of the Court of Appeals in *Haycraft* v. *Board of Education,* to reconcile the decision in this case with the principles enumerated in this Court's leading decision on the ramifications of the use of busing as a remedial tool. *Swann, supra,* 402 U. S. 1, 24.

IV. The Court of Appeals Has Disregarded the Self-Limiting Nature of Busing Described in *Swann* by Requiring Cross-District Transportation That Would "Significantly Jeopardize the Educational Process."

This Court has repeatedly emphasized the authority of the district courts to grant appropriate relief when a constitutional violation is properly demonstrated.

See cases cited at *Dayton, supra,* 433 U. S. 406, 410. Nevertheless, when this Court first recognized the viability of student reassignment and transportation as a remedial tool in school desegregation cases, it clearly recognized the self-limiting nature of the remedy.

> An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process . . . It hardly needs stating that the limits on time of travel will vary with many factors, bus probably with none more than the age of the students. *Swann, supra,* 402 U. S. 1, 30-31.

Here, the additional remedy for first grade children will require in each instance one way bus trips of from somewhat less than thirty minutes to in excess of one hour and ten minutes. These times, of course, are based on normal traffic conditions and would substantially increase in the event of rainy or snowy weather or unusual traffic conditions created by some other cause (Depo. William Blankenbaker, Separate Appendix, pp. 17-30). Over one-third of the children involved would be required to make one way trips of at least 45 minutes. Some children would have to make one way trips in excess of one hour and ten minutes.

To insure the elimination of the preceived violation of "racial identifiability," the Court of Appeals, however, has chosen to ignore these practical limitations on the remedial tool of cross-district busing. *Haycraft* v. *Board of Education, supra,* 585 F. 2d 803, 804, 805-806.

The Court of Appeals has required that a degree of racial balance be imposed for first graders. Certiorari should issue to the Court of Appeals' decision in *Haycraft* v. *Board of Education, supra,* for that reason. Certiorari should also issue, however, because the Sixth Circuit's insistence on racial balance reflects an over-reliance by the circuit courts of appeals on decisions of this Court involving small school systems of very limited geographic size such as *Green* v. *County School Board,* 391 U. S. 430 (1968).

Green involved a school system with only two schools. The school system operated by the Petitioners has over 150 schools with a total pupil population in excess of 100,000 children. The over-reliance on *Green* is clearly evident here. Indeed, *Green* is cited as one of the primary authorities both in *Cunningham* v. *Grayson* and in the more recent decision of *Haycraft* v. *Board of Education.*

The undue reliance on *Green* by the lower courts has already been severely criticized. *Austin, supra,* 429 U. S. 990, 992, fn. 2. This record reveals an additional misapplication of this Court's decisions in *Green* and *Swann* in the context of a large metropolitan school system, and certiorari should issue to correct the confusion in the lower courts caused by such misapplication of the leading decisions of this Court.

V. To Require an Additional Remedy Without Reversing As Clearly Erroneous the Finding That Such Remedy Would Adversely Affect Children Disregards the Proper Allocation of Judicial Functions Required in *Swann* and *Dayton.*

When the District Court first dismissed the consolidated desegregation actions, it made a specific finding of fact that the neighborhood schools merely reflected the racial compositions of the geographic areas served by those schools. The District Court appropriately relied heavily on that determination in its dismissal of the desegregation actions.

When the District Court considered the necessity of requiring first grade children attending clustered schools to participate in cross-district reassignment and transportation, it made numerous specific findings of fact concerning the impact of such transportation on those young children.

> The additional time of travel involved in such cross-district transportation of first grade pupils and the actual transportation itself would add an additional risk of failure for what is already a very high risk population educationally. Such transportation involves both extended time *and* distance of travel which this Court finds would significantly jeopardize the educational process for such children of tender years who have not had the benefit of prior formal educational experience. Findings of Fact and Conclusions of Law, Separate Appendix, p. 14. (Emphasis by the Court.)

When the Court of Appeals reversed the District Court's dismissal of the Complaints in these consolidated desegregation actions, it ordered a systemwide remedy. *Newburg Area Council* v. *Board of Education,* 489 F. 2d 925, 930. The Court of Appeals did not, however, reverse as clearly erroneous the finding of fact that the schools merely reflected the racial compositions of the neighborhoods they served.

The Court of Appeals' reversal of the District Court's continued limited exemption of first grade children from cross-district transportation in *Haycraft* v. *Board of Education* failed to reverse as clearly erroneous the finding by the District Court that such a remedy would adversely affect the educational process for the children involved. 585 F. 2d 803, 806. Understandably, Judge Engle, *dissenting,* respectfully objected to the majority's substitution of its own views for the "informed judgment of the district court." *Haycraft* v. *Board of Education, supra,* 585 F. 2d 803, 807.

As in *Dayton,* the Court of Appeals in this case has failed to set aside as clearly erroneous those findings of fact by the lower court which are crucial to the proper appellate determination of these cases. Certiorari should issue to review the decisions of the Sixth Circuit in light of the substantial issues raised "as to the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system." *Dayton, supra,* 433 U. S. 406, 409, 417-418. *See Swann, supra,* 402 U. S. 1, 28.

CONCLUSION

The requirement by the Sixth Circuit that first grade children with no prior formal educational experience be bused cross-district involving one way trips of from 30 to 75 minutes merely to achieve a predetermined degree of racial balance is indicative of its misunderstanding of the rationale of this Court's decision in *Washington* v. *Davis* and the clear mandate of this Court in *Dayton.*

This Court has granted certiorari in *Dayton IV* and *Penick* v. *Columbus Bd. of Ed.* to review the Sixth Circuit's use of presumptions in those cases, both in the determination of a constitutional violation and in tailoring an appropriate remedy once the violation has been shown. *Columbus Bd. of Ed.* v. *Penick, supra,* 99 S. Ct. 24, 25. In *Cunningham* v. *Grayson,* the Sixth Circuit employed the same presumption of law utilized in *Dayton III.* Those presumptions were specifically struck down by this Court in *Dayton* and are now before this Court *again* by way of writ of certiorari in *Dayton IV.*

Both *Dayton IV* and *Penick* v. *Columbus Bd. of Ed.* were specifically relied upon by the Sixth Circuit in this case to support its decision in *Haycraft* v. *Board of Education* to require additional cross-district transportation of first grade children. This Court must issue contemporaneous writs of certiorari in this case to insure not only a just resolution of this matter, but

also uniform application of this Court's forthcoming decision on the merits in *Dayton IV*.

Respectfully submitted,

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Counsel for Petitioners, Board of Education of Jefferson County, Kentucky and Ernest C. Grayson, Superintendent

Of Counsel:

WOODWARD, HOBSON & FULTON
January 18, 1979.

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of January, 1979 three copies of this Petition for Writ of Certiorari and accompanying separate Appendix were mailed, postage prepaid, to Mr. Thomas Hogan, First National Tower, Counsel for Respondents.

Will H. Fulton

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Counsel for Petitioners

ADDENDUM

ADDENDUM

The following chart lists all elementary schools now in clusters, by cluster grouping. The school listed first in each cluster was formerly predominantly black in racial composition. The other schools in each cluster were previously predominantly white in pupil racial composition.

The first three columns show the present racial compositions of first graders in each school. The last column shows the racial composition of the balance of each school. First graders which are within the mandatory "racial guidelines" of the desegregation plan, even though cross-district busing is not used, are noted with an asterisk in Column No. 3.

ELEMENTARY SCHOOL CLUSTERS

	No. Black	No. White	First Grade % Black	School
Cluster #1				
Schools				
Brandeis	82	12	87.2	28.7
Coral Ridge	7	117	5.6	14.5
Fairdale	12	98	10.9	19.5
Filson	20	60	*25.0	25.6
Minors Lane	8	122	6.1	19.0
Okolona	14	93	*13.0	18.9
Cluster #2				
Schools				
Byck	80	33	70.7	16.2
Dunn	16	50	*24.2	30.5
Hawthorne	4	38	9.5	16.0
Lowell	10	91	9.9	22.9
Stivers	6	38	*13.6	29.0
Cluster #3				
Schools				
Coleridge-Taylor	130	5	96.2	21.1
Bowen	15	60	*20.0	30.7
Lowe	15	94	*13.7	18.5
Norton	43	113	*27.5	33.3
St. Matthews	7	39	*15.2	13.1
Wilder	12	74	*13.9	20.0

ELEMENTARY SCHOOL CLUSTERS (Cont'd.)

	No. Black	No. White	First Grade % Black	School
Cluster #4				
Schools				
Foster	83	4	95.4	35.3
Shacklette	8	62	11.4	22.7
Waller	12	61	*16.4	26.8
Wellington	19	65	*22.6	29.8
Wilkerson	5	66	7.0	21.5
Cluster #5				
Schools				
J. F. Kennedy	164	18	90.1	27.1
Dixie	6	85	6.5	20.1
Layne	21	109	*16.1	25.1
Medora	19	101	*15.8	26.1
Stonestreet	6	99	5.7	17.8
Watson Lane	30	187	*13.8	23.1
Cluster #6				
Schools				
King	128	17	88.2	23.5
Greenwood	2	68	2.8	21.8
Gutermuth	9	64	*12.3	22.9
Jacob	22	106	*17.1	27.0
Sanders	5	63	7.3	29.1
Semple	10	127	7.2	19.4
Trunnell	7	144	5.7	22.5
Cluster #7				
Schools				
Lincoln	81	63	56.2	9.0
Middletown	35	102	*25.5	20.0
Zachary Taylor	27	80	*25.2	19.8
Cluster #8				
Schools				
McFerran	128	16	88.8	28.4
Bates	16	78	*17.0	23.3
Blake	8	99	7.4	23.1
Blue Lick	13	138	8.6	28.8
Laukhug	11	140	7.2	21.4

ELEMENTARY SCHOOL CLUSTERS (Cont'd.)

	No. Black	No. White	First Grade % Black	School
Cluster #9				
Schools				
Parkland	92	8	99.2	25.5
Auburndale	9	111	7.5	19.9
Kenwood	2	81	2.4	15.3
Klondike	14	75	*15.7	26.9
Rutherford	35	122	*22.2	29.0
Shryock	16	29	*35.5	36.9
Wilt	15	77	*16.3	22.2
Cluster #10				
Schools				
Shawnee	88	11	88.8	24.3
Bloom	2	56	3.4	26.0
Camp Taylor	10	52	*19.2	32.6
Chenoweth	7	66	9.5	28.5
Field	2	58	3.3	21.0
Franklin	2	57	3.3	23.5
Gilmore Lane	23	103	*18.2	22.5
Cluster #11				
Schools				
Wheatley	108	10	91.5	15.5
Cochrane	8	74	9.7	25.2
Fern Creek	14	84	*14.2	28.1
Jeffersontown	30	127	*19.1	25.8
Alex Kennedy	20	108	*15.6	23.8
Wheeler	14	103	11.9	20.0
Cluster #12				
Schools				
Young	134	8	94.3	26.7
Eisenhower	8	69	10.3	21.3
Goldsmith	16	36	*30.7	17.2
Johnsontown Road	11	80	12.0	21.7
Kerrick	10	51	*16.3	24.0
Prestonia	1	34	2.8	22.9
Smyrna	15	106	*12.3	24.5

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1131

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST C. GRAYSON, Superintendent - Petitioners

versus

JOHN E. HAYCRAFT, Et Al. - - Respondents

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF FOR RESPONDENTS HAYCRAFT, Et Al. IN OPPOSITION

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TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1131

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST C. GRAYSON, SUPERINTENDENT - *Petitioners*

v.

JOHN E. HAYCRAFT, ET AL. - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

1. Whether a District Court may retain a vestige of state imposed segregation by excluding first graders from a remedial desegration plan?

STATEMENT OF THE CASE

This is another, and hopefully, last chapter in the protected Louisville desegregation case. The original Court of Appeals' decision which held that both the Louisville and Jefferson County had not eliminated "all vestiges of state-imposed segregation" is reported as *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky* 489 F. 2d 925 (CA 6, 1973, vac.

and remanded at 418 U. S. 918 (1974) for reconsideration in light of *Milliken* v. *Bradley,* 418 U. S. 717 (1974), opinion reinstated, 510 F. 2d 1358 (CA 6, 1974), cert. denied 421 U. S. 931 (1975). Subsequently, the Sixth Circuit issued a Writ of Mandamus ordering Judge James F. Gordon to implement a desegregation plan for the 1975-76 school year. *Newburg Area Council* v. *Gordon,* 521 F. 2d 578 (CA 6, 1975). Judge Gordon implemented that plan with his July 30, 1975 order (App. 31-71).

The Jefferson County Board of Education, now merged with the Louisville Independent system, appealed that order. Judge Gordon's plan was affirmed. *Cunningham* v. *Grayson* 541 F. 2d 538 (CA 6, 1976) cert. denied, 429 U. S. 1074 (1977), pet. reh. den. —— U. S. —— (1977), 98 S. Ct. 250.

Subsequent to that a petition for certiorari was filed by an Intervenor, Louis J. Hollenbach, the County Judge, which further sought to attack the desegregation as being excessive and was also denied by this Court. *Hollenbach* v. *Haycraft* cert. denied —— U. S. ——, 98 S. Ct. 418.

Thus this Court has on numerous occasions had an opportunity to review the constitutionality of the basic desegregation plan that has been in operation in Jefferson County, Kentucky since September 5, 1975.

The subject matter of this petition is concerned solely with the recent Sixth Circuit decision of October 20, 1978. 485 F. 2d 803 (CA 6, 1978) concerning the District Court's order of April 18, 1977 which held "that first grade pupils attending the defendant school

system be and they hereby are exempt from the transportation reassignment provisions of our desegregation plan of July 30, 1975, as amended, and until such time as the kindergarten program is available on a system-wide basis or until further order of this court." (App. 9).

The Sixth Circuit held "that the District Court did not have the discretion to exempt the first grade children from the transportation program because the first graders are entitled as much as older children to an education in a public school system not afflicted by state-imposed segregation and that to exempt those students from the busing plan would be contrary to the Court's mandate that all vestiges of state-imposed segregation be eliminated." (App. 5)

To say that the plight of the first graders in Jefferson County has been an on-again off-again proposition is an understatement.

In the original July 30, 1975 desegregation plan, they were exempted from the transportation provisions for the first quarter of the 1975-76 school year. That order, included in Petitioners' Appendix, contemplated that in the second and third quarters of the school year first graders would be reassigned and transported. The first graders would be transported by classroom unit with their teacher from their home school to their away school for a portion of each day. They were to begin and end each day at their home school.

On December 4, 1975 the School Board made a motion to exmept first graders for the entire school year. That motion was not opposed by Respondents since the

basis of it was that the system lacked the required buses. The District Court entered an Order on December 22, 1975 exempting first graders for the 1975-76 school year only.

On March 22, 1976 the Board then filed a motion to exempt first graders permanently. That motion was later limited to the 1976-77 school year. The Board further implemented a cross cultural human relations program which is presumably still being utilized.

The District Judge, by order entered April 1, 1976, exempted first graders for the 1976-77 school year.

Plaintiffs, Respondents herein, filed a Notice of Appeal of that decision on April 5, 1976.

That appeal was withdrawn, at the specific request of Judge James Gordon when he informed all parties in an open hearing held on May 4, 1976 that he would not exempt first graders after the 1976-77 school year.

Subsequently, however, the Board again filed on April 1, 1977, a motion to exempt first graders permanently until there is a county wide kindergarten program. No where in the record, as found by the Sixth Circuit, is there any indication when the contingency might, if ever, be met.

On April 18, 1977 Judge Gordon entered an order exempting first graders from the desegregation remedy (App. 9).

The Sixth Circuit reversed and found that District Court may not "order a remedy of limited scope which leaves many who have suffered violations of their constitutional rights without redress." (App. 5)

It is from this Opinion of the Sixth Circuit, limited solely to the first grade exemption, that review is sought.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The law of this case is clear. The Jefferson County Board of Education was found guilty of violating the constitutional rights of each and every child in Jefferson County, Kentucky. Newburg I, 489 F. 925 (CA 6, 1973). The Sixth Circuit ordered the District Court to eliminate "all vestiges of state-imposed segregation" 489 F. 2d at 932. The plan that would have done that has been upheld by the Court of Appeals and review has been denied by this Court on four separate occasions. The Board has not eliminated segregation "root and branch" by continuing to exempt first graders from the desegration remedy. *Green* v. *County School Board of New Kent County.* 391 U. S. 430, 437.

The mere fact that some first grades are statistically desegregated because of retention rates may be an indictment of the educational process but it is by no means a desegregation plan that promises "realistically to work now." *Green, supra* 391 U. S. at 439.

There is no conflict among the Circuits that have ruled on the exemption of first graders. The Sixth Circuit has now joined the Fifth where in *Flax* v. *Potts,* 454 F. 2d 865 (CA 5, 1972) that Court reversed a District Court's plan that exempted first graders because it was held not to eliminate all vestiges of state-imposed segregation.

And the Eight Circuit in *Clark* v. *Board of Education of Little Rock School District,* 465 F. 2d 1044 (CA 8, 1972) held similarly that the exemptions "appears to be a last ditch effort to retain a segregated school system" 465 F. 2d at 1047.

The Petitioners erroneously rely on *Dayton Board of Education* v. *Brinkman* 433 U. S. 406 (1977) in challenging the Sixth Circuit decision. As Mr. Justice Brennan stated in concerning:

> "The Court today reaffirms the authority of the federal courts" to grant appropriate relief of this sort [i.e. busing] when constitutional violations on the part of the school officials are proved. *Keyes* v. *School District* No. I, Denver, Colorado 413 U. S. 189 (1973)

Here in a *de jure* situation the violations have been shown manifestly. That is the law of the case. To acknowledge the violation and impose no remedy is to ignore every desegregation case since *Brown* v. *Board of Education,* 347 U. S. 483 (1954).

I. A District Court May Not Constitutionally Exempt All First Graders Indefinitely From a Desegregation Plan.

Petitioners are asking this Court to issue a Writ of Certiorari to review the decision rendered in this case by the United States Court of Appeals for the Sixth Circuit on October 20, 1978. That decision related solely and exclusively on the failure to provide for a remedy for the constitutional violations of segregating the first grade students in the Jefferson County System.

Surprisingly, most of their petition is devoted to a polemic on the desegregation plan in chief. That plan has been before this Court on four separate occasions. *Cunningham* v. *Grayson,* 541 F. 2d 538 (CA 6, 1976) cert. denied. 429 U. S. 1074 (1977), pet. reh. den. 430 U. S. 941 (1977), motion to file second pet. reh. den. —— U. S. ——, (1977) 98 S. Ct. 250 and *Hollenbach* v. *Haycraft* cert. den. —— U. S. —— (1977) 98 S. Ct. 418.

If there is any question that this *de jure* case is at all factually similar to the *de facto* situations in Dayton or Columbus, Ohio then the Court need only to be shown the clear distinction made by the Sixth Circuit in the original remand at 510 F. 2d 1358 (CA 6, 1974) cert. den. 421 U. S. 931 (1975).

Suffice it to say that there is, one, and only one, issue clearly before this Court. That is, the constitutionality of the District Court's refusal to afford meaningful desegregation to an entire class of children—i.e. first graders. That is the only issue with which the Sixth Circuit dealt.

In lieu of desegregating the first grades on the same basis as all other grades, the Board proposed and the District Court accepted a "cross-cultural plan for first grade students." (App. 15). The plan consists basically of skits, field trips, and the like.

The District Court concluded that that plan was sufficient to meet the goal of desegregating the first grades. He also included a "voluntary transfer program" in which students could attend the school to which they would have been bused. The Court of Ap-

peals correctly held that this did not constitute a plan to remove all vestiges of state-imposed segregation.

Games, skits, and fun field trips may be educationally innovative but they do not rise to the level of a constitutionally permissible desegregation plan in a system that has been found guilty of *de jure* segregation.

Or as stated by the Tenth Circuit in *Dowell* v. *Board of Education of Oklahoma City Public Schools,* 465 F. 2d 1014, 1016, (CA 10, 1972):

> "The constitutional mandate is not for integrated experiences; but for a desegregated school system."

The District Court made much ado about the alleged frailities of first graders. In certain instances this may well be true. Thus, Respondents did not object to the inclusion in the original plan of a Hardship Policy that could deal with individual children regardless of their age. (App. 48-50). Children, be they first graders, fifth graders, or ninth graders should be treated as individuals in this type of situation. Respondents would never claim that we are dealing with mere statistics to be shuffled around like pawns on a chess board. If a *particular* child, first grade or otherwise, has a problem that can legitimately exempt him/her from transportation then procedures have been set up to accommodate that child. But it does not follow that since *some* children will have a longer distance to travel or *some* children have not had pre-school experience that therefore an entire group of 10,000 children can or should be denied their constitutional right to a desegregated education.

Or as stated by the Sixth Circuit "a District Court (may not) order a remedy of limited scope which leaves many who have suffered violations of their constitutional rights without redress." (App. 5).

As stated earlier there are only two Circuits who have dealt with the "unique" problem of first graders. In *Clark* v. *Board of Education of Little Rock* 465 F. 2d 1044, 1047 (CA 8, 1972) the Court said:

> "It is argued that the plan for grades 1 through 3 in the eastern and western section should be approved because students attending the segregated classes in these grades will be doing so in school building that house integrated 4th or 5th grades. This argument is without merit. See: *Jackson* v. *Marwell School District No. 22.* 425 F. 2d 211 (CA 8, 1970).
>
> It flies in the face of the clear mandate of *Clark* v. *Board of Education of Little School District,* 449 F. 2d 493 (CA 8, 1971) cert. den. 405 U. S. 936 which requires the desegregation process *to apply fully to all elementary grades."* (Emphasis added).

As further pointed out in *Clark,* 465 F. 2d supra at 1046 ft. 5, this Court in *Swann* v. *Charlotte-Mechlenburg Board of Education,* 402 U. S. 1. (1971) specifically approved a desegregation plan that included first graders.

Petitioners raise the issue that somehow by including first graders in desegregation there is the imposition of an "additional remedy" (Pet. brief p. 9). There is no additional remedy. There is only a basic remedy. As the Court of Appeals found previously there was

none. If transportation were an "additional remedy" for first graders then a cultural program and voluntary transfer would have been acceptable for all grades. However, this Court has never found that solution to constitute a constitutionally acceptable desegregation plan. Nor should it here.

There is nothing in the record to indicate that first graders are treated differently than other children in the system.

In fact, in rejecting a first grade exemption the Fifth Circuit stated in *Flax* v. *Potts* 464 F. 2d 865, 869 (CA 5, 1972) that:

> "We find no justification for the non-inclusion of first grade students. They are part of the normal curriculum of the district and entitled to a full and equal integrated education."

As correctly stated by Petitioners in their brief, "This Court has repeatedly emphasized the authority of the district courts to grant appropriate relief when a constitutional violation is properly demonstrated." (Pet. brief. p. 20) However, this Court has never given its imprimateur to the proposition that a violation may be found, but no remedy or an inadequate remedy, granted. That is what Petitioners seek.

The transportation of children away from their neighborhoods may be an unfortunate legacy that this generation must endure. It has become an emotional issue, a political issue and unfortunately a racist issue. Particularly when a school board attempts to use small children in its desire to perpetuate constitutional viola-

tions. The fact is that the Jefferson County Board of Education has had twenty-four years to "do right." For whatever reasons they elected not to do so.

Disappointally, they are grasping at their last hope of retaining some semblance of segregation. This Court and this nation has gone too far in trying to eradicate the past to allow this type of legalistic jabberwocky to prevail.

CONCLUSION

The Petitioners have either misread or misstated the applications of the decisions in *Washington* v. *Davis,* 426 U. S. 229 (1976) and *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406 (1977). This is not an employment testing case nor is it a *de facto* desegregation case. The Sixth Circuit has amply demonstrated the myriad violations by the School Board involved here. The record is clear, concise, and conclusive.

This Court, the Sixth Circuit, and the District Court has evaluated their decision in light of any subsequent decisions and affirmed the original plan. There is no reason to upset a plan, in effect since September of 1975 because of the fallacious argument submitted by the Board.

Therefore the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Response were hand delivered to Will H. Fulton, 2510 First National Tower, this 11 day of February, 1979.

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